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The Due Process Revolution and the Juvenile Court: The Matter of Race in the Historical Evolution of a Doctrine*

Gary A. Debele**

I. Introduction

On June 8, 1964, fifteen-year old Gerald Gault and his friend Ronald Lewis were taken into custody by the sheriff of Gila County, Arizona. A neighbor, Mrs. Cook, had filed a verbal complaint with the local police alleging that a caller or callers had made lewd or indecent remarks to her over the telephone. Gerald and Ronald became the primary suspects. At the time Gerald was picked up for these allegations, his parents did not receive notice as to the complaint or the fact that he had been taken into custody.[1]

By today's standards of procedural due process, the events which followed are truly shocking. The petition filed by the police officer was never served upon Gerald's parents and it made no reference to any factual basis supporting the judicial action which it initiated.[2] The day after Gerald was taken into custody, his mother and brother appeared in chambers before the juvenile court judge. The complainant, Mrs. Cook, was not there; none of the participants were sworn in; no transcript, recording, or memorandum of the proceeding was made.[3]

The judge did not make a decision at the time of this proceed-

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** B.A., St. Olaf College; J.D., University of Minnesota; currently pursuing an M.A. in history at the University of Minnesota with a concentration in American legal and constitutional history. The author would like to express his appreciation to Professor Barry Feld, under whose guidance and in whose juvenile justice course at the University of Minnesota many of the ideas expressed in this article were raised, discussed, and developed.

1. *In re* Gault, 387 U.S. 1, 4-5 (1967).
2. *Id.* at 5.
3. *Id.*

ing and Gerald returned to the juvenile detention home. Several days later Gerald did go home, but his parents never received an explanation why their son had been detained before being sent home. At the subsequent hearing the due process violations continued. Again the court failed to keep a record of the proceeding. Mrs. Cook was not present, with the judge finding her presence not necessary. In fact, the judge himself never even spoke to Mrs. Cook. Gerald's parents never saw a referral report made by probation officers and filed at this hearing.[4] Although the listed charge was simply "lewd phone calls,"[5] Gerald received a harsh sentence. He was ordered to spend the remainder of his minority—six years—at the State Industrial School.[6]

Because Arizona did not permit appeals in juvenile cases, Gerald's parents filed a writ of habeas corpus, challenging the constitutionality of the Arizona Juvenile Code.[7] First, they alleged the Juvenile Code was unconstitutional because it failed to require notice of the hearing, did not provide for a right of appeal, and did not require that the parents and the alleged offender be apprised of the specific charges. Second, Mr. and Mrs. Gault claimed that the proceedings against Gerald violated his constitutional rights to counsel, to confront all witnesses, to assert the privilege against self-incrimination, and to have a record made of the proceeding. Finally, they argued that the juvenile court had erred when it removed Gerald from their custody without first establishing their unsuitability as parents.[8]

The state superior court dismissed the request for the writ of habeas corpus,[9] and the Arizona Supreme Court affirmed.[10] Mr. and Mrs. Gault then sought review by the United States Supreme Court. The Supreme Court reversed the Arizona courts and held that the proceedings to which Gerald Gault had been subjected offended the requirements of due process of law.[11]

After *In re Gault*, juveniles were guaranteed notice of the charges filed against them, the right to have counsel present at the trial and at certain pre-trial proceedings,[12] the right to confront and cross-examine witnesses,[13] the right to be free from self-in-

4. *Id.* at 6-8.
5. *Id.* at 7.
6. *Id.*
7. *Id.* at 8.
8. *Id.* at 9-10.
9. *Id.* at 9.
10. *Id.* at 10.
11. *Id.* at 59.
12. *Id.* at 33-34.
13. *Id.* at 35-42.

crimination,[14] the right to appellate review, and the right to be provided with a transcript of the proceedings.[15]

The Arizona Juvenile Court's treatment of Gerald Gault reflects the notions and practices of an institution created during the first two decades of the twentieth century. During that period—referred to by historians as the "Progressive Era"[16]—the outlines of the juvenile court systems of this country emerged as they would remain until the landmark *Gault* decision in 1967.

Progressive reformers created juvenile courts during a period of historical transition in which the United States evolved from a predominantly rural and agricultural nation into a major urban and industrial nation.[17] Immense societal changes accompanied this transformation and greatly disturbed the reformers with their preference for order, efficiency, and controlled environments. The Progressives especially feared for the well-being of the children living and working within the cities of that period—cities teeming with immigrant masses, burgeoning crime rates, and dangerous factories.[18]

Leading Progressive reformers in Chicago created the first juvenile court in 1899 with hopes of protecting and rehabilitating "delinquent" children whom they believed had been corrupted by these urban surroundings.[19] Regardless of the nature of the offense, Progressives stressed rehabilitation under the direction of numerous "professionals" and "experts" who claimed to apply rational and scientific methods.[20] Progressive juvenile reformers re-

14. *Id.* at 42-57.

15. *Id.* at 57-59.

16. *See infra* note 18.

17. *See generally* William L. O'Neill, The Progressive Years: America Comes of Age (1975); Robert H. Wiebe, The Search for Order, 1877-1920 (1967).

18. Robert M. Mennel, Thorns and Thistles: Juvenile Delinquents in the United States, 1825-1940, at 154-55 (1973). For discussions of American progressivism and American society during those years, see generally O'Neill, *supra* note 17; Wiebe, *supra* note 17. According to Robert H. Wiebe, "If humanitarian progressivism had a central theme, it was the child. He united the campaigns for health, education, and a richer city environment and he dominated much of the interest in labor legislation . . . . The most popular version of legal and penal reform also emphasized the needs of youth." Wiebe, *supra* note 17, at 169.

19. Mennel, *supra* note 18, at 129-32. *See also* Graham Parker, *The Juvenile Court Movement: The Illinois Experience*, 26 U. Toronto L.J. 140, 153-67 (1976). Leading reformers active in the juvenile court movement in Chicago included Jane Addams, Julia Lathrop, Florence Kelly, Lucy Flower, Ethel Sturges Dummer, and John Dewey. *Id.* at 153.

20. Joseph Kett, Rites of Passage: Adolescence in America, 1790 to the Present 215 (1977); David J. Rothman, Conscience and Convenience: The Asylum and Its Alternatives in Progressive America 43 (1980); Mennel, *supra* note 18, at 102-06, 124-26, 145-46, 152-53; Larry J. Siegel & Joseph J. Senna, Juvenile Delinquency: Theory, Practice, and Law 68-91 (1981).

ceived the support of the state through the doctrine of *parens patriae*.[21] Juvenile court judges and reformers maintained that the juvenile court proceedings resembled civil proceedings. The goal was not punishment, but rehabilitation in a setting where the court placed itself in the position of a gently guiding parent steering a wayward child back to the path of "correct" behavior. The juvenile court reformers regarded a rigid adherence to the standard criminal procedures of the day or to any concept of adversarial procedural due process as irrelevant and ultimately detrimental to the best interests of the child.[22]

Sixty-eight years after the creation of the first juvenile court in Chicago, the United States Supreme Court handed down the *In re Gault*[23] decision. In the decision of the Court, the majority expressed its disagreement with the Progressive methods which were still being used. The Court took umbrage with the long standing claims that the juvenile court, through its methods, looked out for the best interests of the child.[24] With the appearance of *Gault*, the "due process revolution"[25] entered the realm of juvenile justice. By the 1960s, the Progressive world view upon which the juvenile

21. Scholars frequently cite the English Chancery Court as the creator of this doctrine. It simply means that the state is viewed as responsible for the well-being of children in situations where parental direction is lacking. Accordingly, the state was expected to treat the delinquent or neglected child in the same manner as would a kind and loving parent. Under the English Chancery system, the king, acting as the father of his country, freely exercised control over the children of the realm. Arnold Binder, *The Juvenile Justice System: Where Pretense and Reality Clash*, 22 Am. Behavioral Scientist 624-26 (July-Aug. 1979); Orm W. Ketcham, *The Development of Juvenile Justice in the United States*, in The Changing Faces of Juvenile Justice 11-13 (V. Lorne Stewart ed. 1978).

22. Binder, *supra* note 21, at 627. Mennel, *supra* note 18, at 138-44; Parker, *supra* note 19, at 267-74, 276-82. For a more detailed discussion of the creation and functioning of the early juvenile courts, see generally James M. Inverarity, Pat Lauderdale & Barry C. Feld, Law and Society: Sociological Perspectives on Criminal Law (1983); Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 Minn. L. Rev. 141 (1984); Ellen Ryerson, The Best-Laid Plans: America's Juvenile Court Experiment (1978); Steven L. Schlossman, Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice, 1825-1920 (1977); Robert M. Mennel, *supra* note 18.

23. 387 U.S. 1 (1967).

24. The language of the opinion itself best captures this challenge to the old Progressive notions. According to Justice Fortas:

> Under our Constitution, the condition of being a boy does not justify a kangaroo court . . . . So wide a gulf between the State's treatment of the adult and of the child requires a bridge sturdier than mere verbiage, and reasons more persuasive than cliche can provide. As Wheeler and Cottrell have put it, "The rhetoric of the juvenile court movement has developed without any necessarily close correspondence to the realities of court and institutional routines."

387 U.S. at 28-30.

25. This term was coined and used as a theme by Fred Graham, The Self-Inflicted Wound (1970).

court had been premised was dramatically out of step with a nation in the midst of a legal and social revolution.

The Progressive Era and the Warren Court have both received extensive study, making it a fairly easy task to compare and contrast their divergent methods of dealing with juvenile offenders.[26] The more difficult endeavor involves accounting for *why* the "due process revolution" and "constitutional domestication of the juvenile court"[27] occurred in 1967 when the Supreme Court handed down *In re Gault*. The purpose of this article is to consider the historical and jurisprudential developments between the Progressive Era and the 1960s and thereby explain why *Gault* occurred when it did.[28]

An explanation for the occurrence of this constitutional domestication can be reached through a two-part analysis. The first

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26. *See supra* note 18; *see, e.g.*, Graham, *supra* note 25; Alexander M. Bickel, The Supreme Court and the Idea of Progress (1970); Archibald Cox, The Warren Court: Constitutional Decision as an Instrument of Reform (1968); Louis M. Kohlmeier, Jr., God Save This Honorable Court! (1972).

27. Professor Barry Feld has entitled a subsection of an article "The Constitutional Domestication of the Juvenile Court;" *see* Feld, *supra* note 22. In that subsection he offers this summary of the events leading to *Gault*:

> Despite occasional challenges and criticism of some conceptual or administrative aspects of juvenile justice, no sustained and systematic examination of the juvenile court occurred until the 1960s. In 1967, however, *In re* Gault began a "due process revolution" that substantially transformed the juvenile court from a social welfare agency into a legal institution. This "constitutional domestication" was the first step in the convergence of the procedures of the juvenile justice system with those of the adult criminal process.

Feld, *supra* note 22, at 151 (citations omitted).

28. This method of explaining and accounting for the dramatic legal, political and cultural events which occurred during the Warren Court era is not unique. Godfrey Hodgson in America in Our Time (1976), explained it this way:

> The more I thought about the political preconceptions with which Americans entered the 1960s, the more clearly it seemed to me that these had been shaped by the great events of the 1940s and early 1950s: by World War II and by the Cold War, by the end of the Depression and the coming of affluence, by the emergence of the United States as a global power, by the Stalinist threat and the McCarthyite response to it in the United States and finally by the great migrations from the country to town, from city to suburb, from East to West, and from South to North.

Id. at 502.

George E. Mowrey & Blaine A. Brownell in The Urban Nation, 1920-1980 (1981), looked at the transformation of American life during the past 60 years through the rapid growth of cities and the accompanying emergence of a mass-production, mass-consumption society: "[T]hese forces have produced a three-fold revolution in the United States shifting the center of social, economic, and political power from the country to the city, strenthening and converting the hesitant world power of the 1914-1918 war into the dominant superpower of the 1980s." *Id.* at viii. *See also* Alexander M. Bickel, The Supreme Court and the Idea of Progress (1970).

step involves the seminal *Brown v. Board of Education*[29] decision which the Supreme Court handed down in 1954. An analysis of the due process revolution in the juvenile justice system must begin by explaining why *Brown* occurred when it did. The second part of the analysis deals with the application of *Brown* principles to juvenile offenders and can be analyzed by looking at the ways in which various segments of American society began working in the late 1950s and throughout the 1960s towards full implementation of the *Brown* decision's dictate of equal treatment. During this period a constitutional revolution began and extended due process and equal protection doctrines to Blacks,[30] criminal defendants,[31] children,[32] women,[33] illegitmate persons,[34] aliens[35] and juvenile offenders.[36] Race was the underlying issue of the *Brown* decision as well as the underlying motivation for the subsequent civil rights movement,[37] and Blacks were the most visibly oppressed segment

29. 347 U.S. 483 (1954). Although it may seem rather odd looking to a case decided on equal protection grounds as a precursor to *Gault*, which was decided on the basis of procedural due process, constitutional historian Paul L. Murphy deals with this problem when he explains how the Supreme Court was able to apply equal protection doctrine to force the District of Columbia to desegregate its schools:

> Although the Fifth Amendment did not contain an equal protection clause, Warren maintained that the concepts of due process of law and equal protection of the law both stemmed from "our American ideal of fairness" and while they were not interchangeable, it was true that discrimination could be so unjustifiable as to be a violation of due process.

Paul L. Murphy, Constitution in Crisis Times, 1918-1969, at 313 (1972).

30. *See infra* note 156, 178.

31. *See infra* note 177.

32. *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (extended first amendment protection of non-disruptive symbolic speech to school children).

33. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (struck down a law preferring males to females when two persons were otherwise equally entitled to be the administrator of an estate); Frontiero v. Richardson, 411 U.S. 677 (1973) (held violative of equal protection a federal statute permitting male members of the armed services an automatic dependency allowance for their wives but requiring servicewomen to prove their husbands were dependent).

34. *See, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968) (held that the denial to illegitimate children of the right to recover for wrongful death of their mother on whom they were dependent was invidious and wrongful discrimination).

35. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (Supreme Court for the first time treated classifications based on alienage as inherently suspect and subject to close judicial scrutiny; the Court struck down a state imposition of a residency requirement on aliens receiving welfare benefits).

36. *See, e.g.*, *In re* Gault, 327 U.S. 1 (1967); *see infra* note 206.

37. In his discussion of the historical and sociological significance of the *Brown* decision, James M. Inverarity also points to the race question as being the core catalyst of the due process revolution:

> The *Brown* decision has come to be viewed by many observers as marking the beginning of the Civil Rights Revolution—a combination of Court decisions, legislation, and social activism that changed dra-

within American society.[38] It is therefore this author's belief that the issue of race was the most significant catalyst for a society-wide due process revolution which would also encompass juveniles appearing before juvenile courts. Indeed, the issue of race is the single most important factor linking the two parts of this analysis.[39]

II. Historical Developments leading to the *Brown* Decision.

What follows is a decade-by-decade assessment of the societal changes occurring within the United States which, in the scope of historical development, explain how this nation evolved from the Progressive Era to *Brown* and the subsequent due process revolution. Jurisprudential developments, because of their great importance in this ultimately legal controversy, shall be considered separately in the following section.

A. The 1920s

The decision to commence this analysis with the 1920s is really quite arbitrary, since the roots of the due process revolution

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matically the status of black people in the U.S. and inspired imitative social protests among women, gays, American Indians, and other oppressed groups.

Inverarity, Lauderdale & Feld, *supra* note 22, at 54. Through a discussion of Jews in Western Europe and the whole civil rights movement for Blacks starting at the Civil War, he provides a Marxist analysis demonstrating the interaction of race and changes in the dominant modes of production leading to the reforms of the 1960s. *Id.* at 54-85.

38. Richard Kluger captures the significance of Black oppression with regard to the due process revolution: "The decision [in *Brown*] marked the turning point in America's willingness to face the consequences of centuries of racial discrimination, a practice tracing back nearly to the first settlement of the New World." Richard Kluger, Simple Justice: A History of Brown v. Board of Education and Black America's Struggle for Equality x (1975).

39. Shortly before this article went into print, Vincent Gordon Harding in *Wrestling toward the Dawn: The Afro-American Freedom Movement and the Changing Constitution*, 74 J. Am. Hist. 718 (1987), looked at the Constitution in American history and identified the central role race has played in the historical evolution of that document:

> Thus the magnificent irony unfolds: The Children of Africa, whose freedom the Constitution makers sacrificed on the altar of a tenuous and limited white unity, became the foremost proponents of freedom and justice in the nation, demanding of the Constitution more than its slave-holding creators dared to dream, wrestling it toward an integrity that the Fathers could not give it. And in the process, though they sustain significant wounds, they also provide opportunities for justice, equity, and hope for many persons other than themselves. Indeed, they encourage others to enter the arena with them to press the nation toward its highest possibilities.

Id. at 719.

span all of American constitutional and social history.[40] Because the ultimate focus of this article is on the roots of the due process revolution as it relates to juvenile court procedure, and given that the first juvenile courts were created during the Progressive Era, the most significant events having an impact on that development most likely occurred during the years following the Progressive Era, starting with the 1920s.

The historical milieu of the Progressive Era which gave rise to juvenile courts in this country changed quite drastically in the 1920s. Americans did not totally repudiate the society the Progressives had created, for the Progressive Era had seen the irreversible change of the United States into a modern urban and industrial society.[41] During the 1920s, a period marked by great prosperity emerged. The First World War had just ended and Americans generally lost the desire to reform and crusade for moral causes which had marked the Progressive Era.[42] Many popular nineteenth century values were severely eroded by the emergence of a mass consumer society which emphasized mass advertizing, installment buying, and the hedonistic appeal of the automobile.[43] The period was also marked by the new popularity of movies, radios, and freer sex.[44] This contrasted quite sharply with the strict and conservative Protestant middle class morals and societal structures of a predominantly rural and small town nation—values from the nineteenth century which the Progressive Reformers had carried into the twentieth.[45]

The radio, the automobile, and all of the other symbols of this newly emerging mass urban culture of the 1920s began to bridge the gap in lifestyles which had for so long separated rural and urban Americans.[46] The diminishing differences between urban and rural dwellers—though certainly not complete by the end

40. For an historical overview of the development of the due process revolution, and especially an analysis of the "nationalization" of the fourteenth amendment, see Richard C. Cortner, The Supreme Court and the Second Bill of Rights: the Fourteenth Amendment and the Nationalization of Civil Liberties (1981).

41. David A. Shannon, Between the Wars: America, 1919-1941, at 66 (2nd ed. 1979).

42. Alfred H. Kelly & Winfred A. Harbison, The American Constitution: Its Origins and Developments 679-85 (2nd ed. 1963).

43. Mowrey & Brownell, *supra* note 28, at 110.

44. *Id.*

45. Shannon, *supra* note 41, at 66-74. For an analysis of the values of the Progressive reformers and personal backgrounds of many of the leaders of the Progressive Era, see generally Robert M. Crunden, Ministers of Reform: The Progressives' Achievement in American Civilization, 1889-1920 (1984).

46. Shannon, *supra* note 41, at 66-83. *See also* Merle Curti, The Growth of American Thought 697-729 (1964).

of the decade—would be a crucial development for the due process revolution; the *Brown* decision and the accompanying due process revolution depended upon a more homogeneous American society more aware of and receptive to the values and demands of certain sectors of the society.

Though American society changed dramatically in the 1920s, advances in legal equality remained elusive because of a strong conservative reaction against the emergent urban mass culture. Prohibition, the activities of a reemerging Ku Klux Klan, and a strong surge of anti-Catholicism and restrictive immigration policies reflected continuing rural and small town values.[47] Conflicts between rural and urban values and Negro-white tensions underpinned much of this conservative reaction.[48]

Given the premise that race was the major catalyst behind the due process revolution,[49] the ferment occurring within the Black community during the 1920s is crucial to any explanation and understanding of the first part of this analysis which focuses on explaining the occurrence of the *Brown* decision. In the first decades of the twentieth century, Blacks continued to experience discrimination under Jim Crow segregation laws in both the north and south.[50] Bizarre racial theories from the nineteenth century, held by academicians and lay people alike, supported the widespread segregation.[51] In their response to this situation, the Black community divided between followers of Booker T. Washington with his Tuskegee Institute, and W.E.B. DuBois—a major leader in the creation of the NAACP in 1908. While Washington advocated a more passive and subservient approach to Black-white relations,[52] DuBois and other Black intellectuals advocated universal manhood suffrage, the abolition of all segregation laws, and the end of race-based educational and training monopolies.[53]

By the 1920s, the NAACP began to use its publications to challenge popular scientific theories of race, segregation, disen-

47. Shannon, *supra* note 41, at 66-67,70,72,89-93.

48. *Id.* at 103. Kelly & Harbison, *supra* note 42, at 685.

49. *See supra* notes 37-39 and accompanying text.

50. Kluger, *supra* note 38, at 105-25. *See generally* C. Vann Woodward, The Strange Career of Jim Crow (3rd ed. 1974); John Hope Franklin & Isidore Starr, The Negro in Twentieth Century America: A Reader on the Struggle for Civil Rights (1967); John Hope Franklin, From Slavery to Freedom: A History of Negro Americans (1974).

51. Kluger, *supra* note 38, at 305-14. For a more detailed discussion of the theories underlying racism in the nineteenth and early twentieth centuries, see George M. Fredrickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny, 1817-1914 (1971).

52. Kluger, *supra* note 38, at 95-100.

53. *Id.*

franchisement, and the general lack of Black civil rights. More importantly for future developments, the NAACP commenced judicial challenges in which it sued various government officials for discriminatory actions.[54] The lack of success in many of these cases revealed a source of Black harassment: helplessness before the mystifying process of the American court system. The increase in the NAACP's stature and activity during this period coincided with the first major migration of Blacks to the now burgeoning industrial cities. Numerous race riots occurred which, given the development of a mass urban society and improved mobility and communications, began to alert more people to the existence of Black legal and social deprivations. Despite wider awareness of these problems, racism increased during this era.[55]

With Blacks more frequently entering the courts under the direction of the NAACP and leaving the stifling confines of the rural South, a Black cultural renaissance occurred in Harlem during the 1920s. Distinct and recognized Black artists and artistic styles marked this cultural awakening.[56] Though all of this served to increase Black visibility among white urban Americans and to make Blacks more aware of their own unjust situation, most Blacks remained apathetic to their plight. In addition to this apathy, courts and legislatures refused to assist in altering the social structure of the United States.[57]

B. The 1930s

With the crash of the stock market in 1929, a new period of historical importance descended upon the United States. The Great Depression and the subsequent New Deal proved to be even greater catalysts for the due process revolution than any of the developments of the 1920s.

During the 1930s, a massive reorientation of the collective American mind occurred—demonstrated by the traumatic effect of

54. *See, e.g.*, Buchan v. Warley, 245 U.S. 60 (1917) (the Court struck down a law allowing a city block which had a majority of white residents living on it to bar Blacks from moving in); Moore v. Dempsey, 261 U.S. 86 (1923) (the Court reversed a jury conviction of some Black defendants and stated that the existence of strong public passion had the effect of denying the defendants due process of law); Corrigan v. Buckley, 271 U.S. 323 (1926) (the Court upheld racially restrictive covenants); Nixon v. Herndon, 273 U.S. 536 (1927) (the Court struck down a Texas law which specifically denied the Negro the right to vote in a primary election).

55. *See* Kluger, *supra* note 38, at 110-11, 114-16. *See generally* Franklin & Starr, *supra* note 50.

56. For a general discussion of the development and impact of a uniquely Black American culture and collective consciousness, see Lawrence W. Levine, Black Culture and Black Consciousness (1977).

57. Kluger, *supra* note 38, at 116.

the Depression and the response to that crisis in the form of the New Deal. Many Americans abandoned the doctrines of laissez-faire capitalism and Social Darwinism.[58] The long-held faith in an always bountiful and just capitalist order suffered a severe blow.[59] Americans in general became dissatisfied with the status quo and became more willing to experiment with new approaches to problems and to vocally protest current government policies.[60] A strong strain of democratic nationalism also emerged. This was not so much patriotic chauvinism, but increasing pride and consciousness with regard to the various cultural traditions and customs of the United States. An expanded acceptance of cultural pluralism, a new social consciousness, and an increased willingness to invest in the common good at the expense of individual freedom accompanied these developments.[61] The world of science also changed as scientists began to question traditional notions of causation.[62] The belief that there were no absolute answers or simple black and white explanations became more widespread. These changes in the cultural and intellectual climate pervaded American society from 1931 until Pearl Harbor in 1941.[63] This increasing disregard of old values and methods prepared the way for the due process revolution, which in its first stages involved disposing of legal doctrines and social views cherished by many Americans from the earliest years of the Republic.

With the start of the Depression, the migrations to the cities stopped. These cities, having grown dramatically since the turn of the century, were now full of potentially powerful and discontented masses. Franklin Delano Roosevelt recognized these developments and was the first American president to become intimately concerned with urban life and urban problems. He found new political support in the cities; the urban middle class, laborers, and Blacks became the backbone of the New Deal coalition.[64] The politically astute FDR overcame the divisiveness of American society and unified those varied groups through the development of a powerful political label—New Deal Liberalism—which would last well into the post-war years. In this new polit-

58. Mowrey & Brownell, *supra* note 28, at 110; Curti, *supra* note 46, at 710-20.

59. *Id.*

60. Shannon, *supra* note 41, at 176-79.

61. *Id.*

62. Curti, *supra* note 46, at 702-09.

63. *Id.* at 698-720; Mowrey & Brownell, *supra* note 28, at 110; Shannon, *supra* note 41, at 217.

64. Theda Skocpol, *Legacies of New Deal Liberalism*, Dissent 33-34 (Winter 1983); Ronald D. Rotunda, *The Liberal Label: Roosevelt's Capture of a Symbol*, 17 Pub. Pol'y 377-408 (1968).

ical coalition, FDR joined traditional Jacksonian egalitarianism with the new values and realities of the urban masses.[65]

Adherents to this new ideology claimed that the nation's problems during the 1930s resulted generally from political, economic, and social privilege; therefore, the cure lay in the extension of democracy, equality of opportunity, and an increase in the power of ordinary citizens to make society's basic decisions.[66] As this ideology would subsequently provide the intellectual framework for the due process revolution, it is not surprising that several of the Supreme Court justices who later led the due process revolution from the nation's highest court were New Deal appointees and vigorous adherents of New Deal Liberalism.[67]

The Depression and the New Deal also led to major changes within the political institutions of the United States. These institutional transformations, like the cultural and economic developments discussed above, would ultimately have a tremendous impact on the occurrence of *Brown* and the due process revolution. FDR believed, and the majority of Americans eventually came to accept, that a strengthened national government remained the only option available in dealing with the difficult problems brought about by the Depression. Much of this newly centralized power resided not with the legislative or judicial branches, but with the executive branch.[68] FDR, more than any other president in American history, enjoyed immense powers throughout an unusually long presidency. He staffed his administrative agencies with social reformers and New Deal engineers at a time when those agencies exerted tremendous influence within American society.[69] Though generally intellectual elitists, some of the New Deal administrators advocated the protection of civil rights for all people, regardless of race or creed.[70]

This very important institutional development reflects Godfrey Hodgson's observation of a critical trend in American history which began during the New Deal era: increasingly concentrated power in the office of Chief Executive so as to better deal with an increasingly complex world.[71] Individuals, cities, and states during

65. *See* Mowrey & Brownell, *supra* note 28, at 79-84; Curti, *supra* note 46, at 716-20; Shannon, *supra* note 41, at 214-16.

66. Shannon, *supra* note 41, at 214-16.

67. Mowrey & Brownell, *supra* note 28, at 79-84.

68. Murphy, *supra* note 29, at 128-29.

69. *See id.* at 99-100, 128, 154; Mowrey & Brownell, *supra* note 28, at 108-10.

70. *See* John Salmond, *Vanguard of the Civil Rights Movement: The Post New Deal Career of Aubrey Willis Williams*, 44 The Historian 51-58, 67-68 (Nov. 1981).

71. Hodgson, *supra* note 28, at 99-100. After tracing this development of the transformation of the Office of the Presidency from the New Deal era to the bu-

the New Deal era more frequently looked to Washington for guidance, and also blamed Washington when things went wrong. This development would have an extremely important impact on the subsequent due process revolution, given that local communities, courts, and legislatures often perpetrated many of the deprivations of civil rights and liberties.[72] Just as Americans would turn to the federal government for economic help during the New Deal era, advocates of the expansion of civil rights increasingly began to look to the federal government for assistance in dealing with the deprivations.

Given the centrality of race to the *Brown* decision and the due process revolution, conditions within the Black community during the 1930s help to illustrate and explain the historical development of this revolution. Blacks were more harshly affected by the Depression than any other group.[73] Though Blacks had been staunch Republicans since the time of Lincoln, during the New Deal they overwhelmingly joined FDR in his new urban coalition.[74] The Depression decade's mood of equality, cultural pluralism, and other changes in basic values served to give Blacks a boost in their long struggle for equality. Although FDR ultimately acquiesced to a Congress and Democratic Party controlled by conservative southern Democrats and did not provide Blacks with the same number of gains as he did labor and other segments of society, the New Deal era did lay the foundation for many of the postwar gains the Black community would enjoy. While Blacks suffered economically more than other groups during the Depression, they received more support from the federal government,[75] probably making them more cognizant than others of this new shift in the sources of power and influence. Hence, Blacks seemed willing to turn away from the more conservative and often blatantly racist local and state governments. This was a lesson they would remem-

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reaucratic institution it subsequently became, Hodgson concludes of the modern presidency:

> The White House is supreme over war and peace, over economic intelligence and planning, and over the power of the purse. It can, of course, also reach out into any other particular issue that it needs to control. For example, it reached out and took control of civil rights under Kennedy and more particularly under Johnson. But in normal times, the four functions that the White House routinely controls—the budget, economics, defense, and foreign policy—make it sovereign within the federal government.

Id. at 108-09.

72. *See generally* Cortner, *supra* note 40.

73. Shannon, *supra* note 41, at 227.

74. Mowrey & Brownell, *supra* note 28, at 206.

75. Shannon, *supra* note 41, at 227.

ber after the Second World War.[76]

Blacks continued to work at improving their legal and social positions during the Depression and New Deal period. The NAACP and Howard University Law School together became a powerful weapon in the fight for civil rights during the 1930s.[77] Howard University emerged as a clearinghouse for the legal fight that continued to gain momentum during the 1930s.[78] This university encouraged Black law students to be social engineers and, in effect, it became the birth place of civil rights law. The NAACP utilized this pool of increasingly competent civil rights lawyers to launch a barrage of lawsuits aimed at ending racial discrimination in various sectors of American society.[79]

Historian David Shannon boldly concludes that the above discussed developments resulted in an increase in the number of whites outside of the South who were opposed to racial discrimination.[80] Though he admits that concrete evidence is sparse, he supports this conclusion by citing the decrease in popularity of Amos and Andy, the appearance of Richard Wright's *Native Son*[81] as a best seller and book-of-the-month selection, and the fact that most Americans were outraged at Hitler's racist treatment of Jesse Owens at the 1936 Olympics.[82] Shannon further argues that despite tension between white and Black laborers in the 1930s, some unions realized the strength of Black labor support. Both the UAW and the CIO insisted upon full Negro participation and often refused to segregate the locals or accept contracts with different wage rates for Blacks and whites.[83]

This changing view of racial discrimination in American society which stemmed from the increased visibility of Blacks in urban areas, the increased prominence of their litigation, and the increasing importance of a more powerful and less racist federal govern-

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76. *Id. See also* Richard Polenberg, One Nation Divisible: Class, Race, and Ethnicity in the United States since 1938, at 15-45 (1980). *See generally* Franklin, *supra* note 50. For discussions of the violence Blacks experienced at the hands of local government entities even during the 1930s, see Dan T. Carter, Scottsboro: A Tragedy of the American South (1979); James R. McGovern & Walter T. Howard, *Private Justice and National Concern: The Lynching of Claud Neal*, 43 The Historian 546 (1981).

77. Kluger, *supra* note 38, at 123.

78. *Id.* at 127.

79. *Id.* at 123, 155-73, 214. *See supra* note 54; *infra* notes 108-10, 140-42, 156, 178.

80. Shannon, *supra* note 41, at 227.

81. This is a novel about a Black youth growing up in a ghetto, the victim of blatant racism. Richard Wright, Native Son (1940).

82. Shannon, *supra* note 41, at 227.

83. *Id.*

ment within American society, paved the way for the seminal *Brown* decision.

C. *World War II*

With the start of the Second World War, the United States witnessed tyrannical governments destroying the ideals of liberty and human dignity which had developed in Western culture over the past three centuries. This development would have a most profound impact on the way Americans came to view their own history and their contemporary society.[84] With the start of this war, the previously discussed trends of a more pervasive federal government and a strengthened chief executive continued. In the introduction to his important study of American society during the war years, Richard Polenberg alludes to the importance of the Second World War to subsequent civil rights developments:

> World War II radically altered the character of American society and challenged its most durable values. The war redefined the relationship of government to the individual and of individuals to each other, and it posed questions about the relationship between civilians and the military, between liberty and security, and between special interests and national purpose which continue to perplex Americans. Pearl Harbor marked more than the passing of a decade; it signified the end of an era and the beginning of a new.[85]

As the United States mobilized for war, the points of contact between government and the individual increased dramatically. Building on trends begun during the Depression and the New Deal era, the major beneficiary of an increasing concentration of power which accompanied the war continued to be the president and the executive administrative agencies rather than the legislative branch. This trend would subsequently assist civil rights leaders by providing alternative sources of power to turn to when Congress and the individual states refused to respond to the demands of these leaders.[86]

Presidential power was not the only force in American society in ascendancy during the war. Business and agriculture also started to consolidate into huge conglomerations.[87] The migration to the cities, though halted temporarily by the Depression, re-

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84. *See generally* Hodgson, *supra* note 28, at 16-47.

85. Richard Polenberg, War and Society: The United States, 1941-1945, at 1 (1972).

86. Kelly & Harbison, *supra* note 42, at 791.

87. *See* Mowrey & Brownell, *supra* note 28, at 166; *See also* Kelly & Harbison, *supra* note 42, at 790-91.

sumed dramatically.[88] The increased industrial productivity which came with a society geared up to fight a war fueled the emergence of a consumer society in the 1950s even more expansive than the trend begun in the 1920s.[89] Finally, the number of women and Blacks entering the work force increased dramatically, with labor shortages permitting both groups to enter fields they had previously been excluded from.[90]

World War II also caused some perplexing developments within the collective American psyche. A new confidence in American values and institutions emerged as the nation fought fascism and dictators. According to intellectual historian Merle Curti, Americans came to see the United States as a sanctuary of light and learning, with the old dream of intellectual superiority arriving at last.[91] Uneasy feelings simultaneously developed regarding the increased burden of becoming the world's strongest power virtually overnight, the terrible destruction and future implications resulting from the dropping of atomic bombs on Hiroshima and Nagasaki, and the increasingly apparent contradictions in the way the United States treated its minority peoples.[92] According to historian Richard Polenberg, "American society on the eve of World War II was sharply divided along class, ethnic, and racial lines."[93] Sharp regional contrasts continued to divide the nation. Government officials hoped the patriotic sentiments of the war years would ease those divisions, and, with the start of the war, a great wave of unity did in fact sweep the nation. Beneath the surface, however, many of the earlier racial, ethnic and urban-rural tensions and contradictions persisted and would resurface in the early post-war years.[94]

Race, that central facet of the due process revolution, remained a cause of concern even during the unifying war years. Despite the migration of Blacks to urban areas starting in the 1920s, in the years immediately before the war three-quarters of all Blacks still lived in the South under strict Jim Crow laws.[95]

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88. *See* Mowrey & Brownell, *supra* note 28, at 166.

89. *See generally id.*, at 172-73.

90. *See* Karen Tucker Anderson, *Last Hired, First Fired: Black Women Workers during WWII*, 69 J. Am. Hist. 82, 82-83 (1982).

91. Curti, *supra* note 46, at 728.

92. *See generally* Hodgson, *supra* note 28, at 16-47. The most notorious examples of contradictory treatment of minorities during the war years include the segregation of Blacks in the armed forces and the internment of Japanese Americans in concentration camps.

93. Polenberg, *supra* note 76, at 15.

94. *See id.* at 15-47; Curti, *supra* note 46, at 728-38.

95. Polenberg, *supra* note 76, at 25.

Northern Blacks also continued to encounter a rigid color line.[96] While FDR and other New Dealers moved very cautiously on the race issue during the 1930s, during the war years, FDR was even more reluctant to sponsor anti-discrimination measures that would alienate members of Congress from the South whose support he needed for his national defense and foreign policy initiatives.[97] Though they gained in visibility and more vigorously challenged their status in American society, Blacks remained politically impotent. The war effort, however, helped to change that situation.[98]

During the war, twelve million men and women left home to enter the armed forces and fifteen million civilians relocated so as to take jobs with the burgeoning defense industry and other war-related enterprises.[99] As a result, Blacks poured into New York, Chicago, Los Angeles, Philadelphia, the steel cities of the Great Lakes area, and other northern urban areas. From 1940 to 1944, the Black population in urban areas increased by forty-nine percent.[100] Employers in need of workers began to overlook race and to integrate their work forces.[101] This influx no doubt aggravated racial tensions, but helped the movement towards better Black organization and caused an increasingly mobile America to become less provincial with regard to race issues.[102] All of these trends led to the revolution in the treatment of Blacks which ultimately culminated with *Brown* in the 1950s.

During the thirties, great advances were made in the social sciences—particularly sociology and anthropology. This trend continued during the war years. As part of this development, many of the nineteenth-century theories of race and cultural development were being repudiated. For example, Franz Boas and Otto Klineberg had challenged the idea that some races were superior to others. Margaret Mead's popular works disseminated similar

96. *Id.* at 28-29.

97. *Id.* at 31-34. Especially in the vital areas of housing and jobs, Blacks continued to experience overt discrimination.

98. *Id.* at 28-34.

99. *Id.* at 54-55.

100. *Id.* at 73.

101. *Id.* at 74.

102. *Id.* at 73. As an example of the increased racial tensions which accompanied these demographic shifts, many white homeowners in northern cities, afraid that Blacks would expand into their neighborhoods, attempted to prevent Blacks from living in federal housing projects. In fact, threats of violence in Buffalo, New York, caused the government to cancel plans to build federally funded housing projects. In Detroit, a mob of whites armed with rocks and clubs prevented Black families from moving into federal housing projects. Eventually, the families were able to move in, but only with a police escort. *Id.*

new ideas to a broader public audience.[103] This trend gained momentum as the United States fought a nation with very extreme racist theories, and caused many Americans—not just academicians—to reconsider the underlying basis for the racial segregation and legal inequality premised on the now defunct racial theories of the nineteenth-century.[104]

The resulting geographical shifts and increased occupational mobility accompanied by the social, intellectual, and economic alterations contributed to the subsequent escalation of racial tensions. From the Black perspective, the lowering of some barriers made those that remained all the more intolerable.[105] Thus, while ethnic distinctions disappeared in the more unified and increasingly mobile and homogeneous consumer society, and as class lines narrowed with the widespread affluence brought about by the wartime economy, racial tensions were exacerbated through the increased contact and increasingly apparent inequalities and contradictions in the treatment of Blacks.[106]

Though Black militancy increased in some labor disputes, during the war years many Black leaders generally avoided violent and disruptive challenges to racism. Instead, these Blacks peacefully sought aid from white liberals in their congressional and court battles.[107] However, white liberals who realized that the treatment of Japanese Americans and the very existence of Jim Crow laws were highly incongruous with the fight against racist fascism were not yet numerous or influential enough to reverse government policy. Blacks continued to litigate discrimination in housing,[108] transportation,[109] employment,[110] and the military ser-

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103. *Id.* at 70-71. *See also* Philip Gleason, *Americans All: World War II and the Shaping of American Identity*, 43 Rev. Pol. 483 (1981). *See, e.g.*, Otto Klineberg, Race Differences (1935); Otto Klineberg, Negro Intelligence and Selective Migration (1935); Franz Boas, The Mind of Primitive Man (1938); Margaret Mead, Coming of Age in Samoa (1928).

104. *See* Polenberg, *supra* note 76, at 70-71, 73; Gleason, *supra* note 103, at 483-502. In addition to the new theories by the above-discussed sociologists, during the war years Swedish economist Gunnar Myrdal wrote An American Dilemma: The Negro Problem and Modern Democracy (1944) in which he criticized American oppression of Blacks. According to Kluger, civil rights groups seized upon this book in their attack upon America's racial problems. Kluger, *supra* note 38, at 256.

105. Polenberg, *supra* note 76, at 78.

106. *Id.* at 70-78.

107. *See generally* Kluger, *supra* note 38, at 239-55.

108. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948) (held that though racially restrictive covenants were still private and legal acts of discrimination, such covenants were unenforceable by resort to the courts). *See also* Hurd v. Hodge, 334 U.S. 24 (1948) (companion case to *Shelley*).

109. *See, e.g.*, Mitchell v. United States, 313 U.S. 80 (1941) (held that where separate rail cars are authorized by law, facilities provided must be equal); Morgan v.

vice.[111] In years which saw an extraordinary emphasis placed upon national unity, race remained a source of enormous division in American life.[112] The contradictions and complexities which existed in American society during the war played a significant role in the occurrence of *Brown* and the due process revolution.

D. The Post-War Years Leading up to Brown

The years following the war became increasingly tense, confusing, and frustrating for the United States. Even though the United States had emerged victorious and the most powerful nation on earth, the nation became increasingly preoccupied with fears of communism and the internal race problems only worsened. Much of the tension of the era probably resulted from a major contradiction: the United States emerged from the war the leader of the "free world" and engaged in a struggle with the forces of a supposedly repressive communism, while at the same time American Blacks continued to be treated like second-rate citizens.

In his analysis of American society, Godfrey Hodgson looked back to the 1940s and early 1950s to find the sources of dissent and turmoil which produced the civil rights movement of the 1960s. First, he cites the fact that between 1941 and 1945 the United States emerged as the strongest power in the world and ended its long-held doctrine of isolation in foreign policy.[113] Second, the United States experienced much frustration in possessing such power while also realizing that the world refused to be molded by it.[114] Third, Hodgson claims World War II ended the Great Depression and unleashed an economic leap forward which produced increased prosperity and gradually engendered an ideology that American capitalism could produce abundance on such a scale that social problems would be drowned under a flood of resources.[115] Finally, Hodgson argues that the great migration to, and isolation

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Virginia, 328 U.S. 373 (1946) (struck down state law requiring segregation on interstate carriers).

110. *See, e.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (held that a majority union cannot enter into contracts that discriminate against non-member minority workers).

111. For a discussion of discrimination in the armed services and the response by the NAACP, see Kluger, *supra* note 38, at 226-27.

112. *See* Polenberg, *supra* note 76, at 69-78; Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 J. Am. Hist. 661, 662, 679 (1971). *See generally* Polenberg, *supra* note 76.

113. Hodgson, *supra* note 28, at 17.

114. *Id.*

115. *Id.* at 18. See also Curti, *supra* note 46, at 752, for a discussion of the "cult of widespread prosperity."

of Blacks in, northern industrial cities with corresponding white flight to the suburbs moved the question of race to the center of national concerns.[116] Much of the analysis that follows will expand and apply some of Hodgson's observations of American society.

As Hodgson's study of developments in American society during the post-war years indicates, foreign policy concerns had a dramatic impact on the domestic due process revolution which occurred during those years. For example, when the United States found itself a superpower nation after the war and no longer able to enjoy an isolationist foreign policy, the newly enhanced American presence in world affairs gave the nation an increased incentive to live up to the values at home which it so vociferously espoused abroad as it assisted in rebuilding Europe and Japan.[117] Furthermore, the federal government and an American population experiencing a communications and transportation revolution accompanied by increased opportunities to follow global events generally became more sensitive to, and cognizant of, racial issues both in the United States and in the ever-growing Third World.[118]

In response to the perceived communist menace, during the early post-war years there was a desire to affirm the fundamental soundness of American governmental, social, and cultural institutions. Sociologists of the period stressed the homogeneity and lack of class consciousness which they said uniquely marked American society.[119] Despite such assertions of egalitarianism, activities in Washington and the situation of Blacks in this country belied such claims. President Truman favored legislation to promote racial equality.[120] Blacks had, after all, become visible in the northern urban areas and a more potent political force. President Truman urged Congress to eliminate poll taxes in federal elections, severely punish lynch mobs, create a Fair Employment Practices Committee with real authority, protect the right to vote, and eliminate segregation in interstate transportation.[121] Truman and other supporters of reform tried to use the Cold War atmosphere to

116. *See* Hodgson, *supra* note 28, at 18.

117. *See id.* at 16-47.

118. *Id. See generally* Polenberg, *supra* note 76.

119. For sociological works of the era which stressed that United States society had very little class divisions, unlimited social mobility, and was the model of a pluralistic society, see generally David Riesman, The Lonely Crowd (1950); Reinhold Niebuhr, The Irony of American History (1952); Editors of *Fortune Magazine*, USA: The Permanent Revolution (1951), as cited by Polenberg, *supra* note 76, at 101-103.

120. Polenberg, *supra* note 76, at 108.

121. *Id. See also* Mowrey & Brownell, *supra* note 28, at 206-07.

their advantage by arguing that the United States could improve its image in Africa and Asia by ending Jim Crow.[122] Yet, with the Cold War preoccupying the politicians in Washington and with many leaders stressing a return to traditional American values, this was hardly an opportune time to conduct a thorough and much needed critique of American political and social institutions.

In addition to these general pressures from both abroad and within for reform, the Cold War and McCarthyism were important events of the immediate post-war years leading to *Brown*. Hodgson persuasively argues that both the Cold War and Senator McCarthy's antics emerged as a result of the paranoia and frustration which came with the realization that the United States, despite its immense post-war power, could not completely control world events.[123] Such fears and frustrations were at the core of the Internal Security Act of 1950,[124] the Walter-McCarran Immigration Bill of 1952,[125] and the general destruction of due process rights for aliens and other "radical" suspects. This rather reactionary attitude of the Cold War era is difficult to place within the developments leading up to *Brown*, other than to speculate that perhaps the nation had gone to such an extreme in this witch hunt that an extreme in a different direction was necessary to return to a more balanced world view. Ultimately, the *Brown* holding was really a rather isolated event in the early 1950s when it would be at least another decade before reality began to measure up to the doctrine espoused by the Court in that decision.[126] Nevertheless, the decision proved an important first step in the due process revolution.

The mass culture of consumption and abundance based on the urban lifestyle which first emerged in the 1920s reached its peak in the 1950s. Hodgson very accurately stresses this as an important post-war phenomenon.[127] Education aided the creation of a mass consumer culture as formal schooling became more wide-

122. Polenberg, *supra* note 76, at 108-09.

123. Hodgson, *supra* note 28, at 17.

124. This Act, (Pub. L. No. 81-1024, 64 Stat. 987) (codified at 50 U.S.C. § 781 (1950)), required Communist organizations to register with the Attorney General and furnish complete membership lists and financial statements. It made it illegal to conspire in any act which would "substantially" contribute to a dictatorship in the United States. In times of an internal security emergency, the Attorney General was to apprehend and intern persons posing such a threat. Murphy, *supra* note 36, at 291.

125. This bill, (Pub. L. No. 82-449, 66 Stat. 143) (codified at 22 U.S.C. § 1651 (1952) (repealed 1954)), contained provisions to prevent the admission of "possible subversives" into the country and permitted the expulsion of "dangerous aliens." Murphy, *supra* note 36, at 292.

126. *See* Hodgson, *supra* note 28, at 16-47; Polenberg, *supra* note 76, at 86-126.

127. Hodgson, *supra* note 28, at 72.

spread and continued to make American society more homogeneous.[128] During the 1950s many people moved into the suburbs and into ranch-style houses of similar design; the highway system linked the nation, as did the more pervasive forms of the mass media such as national television, the large metropolitan newspapers, and national news magazines. Corporations and labor unions became powerful *national* institutions, unifying people and interests across the country. FDR's New Deal liberalism, which stressed free market capitalism in conjunction with government support and assistance was actually entrenched still further by the republican President Eisenhower.[129] Political power in the rural areas decreased, as did regionalism and class consciousness.[130] With the traditional local sources of racism losing in stature, racism moved into the inner cities.[131] Ultimately, with a more homogeneous and increasingly interconnected nation, more people became aware of the repression of Blacks.[132]

In addition to the above developments, by the 1950s Americans became obsessed with juvenile delinquency and youth culture.[133] The 1950s saw a dramatic increase in the number of persons getting married and having children. This birth of a new "baby-boom" generation created a new interest in youth culture, youth institutions, and youth control. Government officials, sociologists, law enforcement officials, and journalists all reported increasing amounts of juvenile crime during this period.[134] In 1953, the Senate created a subcommittee to investigate juvenile delinquency.[135] New studies on delinquency focused on the effects of family dynamics, poverty, exploitation, race, and the role of new youth publications, radio, movies, and television in shaping a distinctive youth culture.[136] The varied manifestations of this new youth culture troubled an adult middle class which feared that the

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128. *Id.*

129. *Id.*

130. *Id.* at 51, 53-54, 67-76, 139-49.

131. *See id.* at 61.

132. *See id.* at 62. *See also* Mowrey & Brownell, *supra* note 28, at 169-97.

133. James Gilbert, A Cycle of Outrage: America's Reaction to the Juvenile Delinquent in the 1950's, at 14 (1986)

134. *Id.* at 79.

135. *Id.* at 143.

136. *See id.* at 79-89, 127-42. Groups involved in such studies included the National Congress of Parents and Teachers, the American Bar Association, and various organizations representing the motion picture industry, the radio industry, and the comics industry. Examples of studies involving these new focuses include Gunnar Myrdal, An American Dilemma: The Negro Problem and Modern Democracy (1944); Earl Koos, Families in Trouble (1946); Eleanor Sheldon Gluek, Unraveling Juvenile Delinquency (1950); Eleanor Sheldon Gluek, Delinquents in the Making (1952); Albert Cohen, Delinquent Boys: The Culture of the Gang (1955); Richard

sources of these new aspects of youth culture were to be found among Blacks, lower class people, and juvenile delinquents.[137] New frictions between adults and youth, along with increased attention given to young people and delinquency, are important elements in explaining the occurrence of *Brown*—a decision which ultimately addressed the issue of the just and equal treatment of American youth in the classroom setting.

Despite the larger trend toward homogeneity in American society, all was not consensus, uniformity, and prosperity. Rather, a need for social and legal reform legislation continued. When Presidents Truman and Eisenhower attempted to move in previously uncharted directions in dealing with the social problems of the era, other forces defeated their efforts. Examples include congressional refusal to provide federal aid to education, to reform the system of agricultural price supports, or to create national health insurance.[138] Powerful pressure groups aligned themselves against many of the reformist proposals of the late 1940s and 1950s.[139]

Blacks continued to experience discrimination in the 1950s, and the NAACP continued its legal struggle during these post-war years. The NAACP initiated lawsuits against discrimination in transportation,[140] voting,[141] and education.[142] The majority of

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Cloward & Lloyd Ohlin, Delinquency and Opportunity (1960). *See* Gilbert, *supra* note 133, at 79-89, 127-42.

137. Gilbert, *supra* note 133, at 3-7. Manifestations of this new youth culture included rock and roll music, new clothes and hairstyles, an increasing youth independence arising from widespread youth employment and automobile possession, and more premarital sex and earlier marriage. *Id.* at 14-15, 17.

138. Polenberg, *supra* note 76, at 107.

139. *Id.*

140. *See, e.g.*, Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (upheld a Michigan law guaranteeing full and equal accommodations on public carriers); Henderson v. United States, 339 U.S. 816 (1950) (invalidated racial discrimination in railroad dining car facilities).

141. *See, e.g.*, United States v. Classic, 313 U.S. 299 (1941) (held that the federal government could lawfully regulate a state primary where such an election was an integral part of the machinery for choosing candidates for federal office); Smith v. Allwright, 321 U.S. 649 (1944) (held that since Texas had delegated to the Democratic Party the right to fix qualifications for party membership, barring participation by Blacks amounted to state action and was therefore unconstitutional); Schnell v. Davis, 336 U.S. 933 (1949) (refused to review decision of lower federal court declaring void Alabama's Boswell Amendment, which provided that voters must be able to understand and explain any article in the state constitution in order to register); Terry v. Adams, 345 U.S. 461 (1953) (extended the *Allwright* holding to "private primaries" held in Texas).

142. *See, e.g.*, Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (Missouri's refusal to admit black applicants to its state law school was held to violate the equal protection clause of the fourteenth amendment, and the state's offer to pay fees in another state did not remove the discrimination); Sipuel v. Board of Regents, 332 U.S. 631 (1948) (held that as long as Oklahoma furnished white persons with legal education, the Black petitioner was also entitled to secure a legal education af-

Americans declined to join the fight and presidents could not yet ignore this political reality. Even though the nation had become more urban and federal power continued to grow while the influence of state and local governments waned, Southern Democrats with their frequently racist and conservative attitudes often possessed the key positions on pivotal committees in Congress.[143] These politicians frequently defeated legislative initiatives for equality.[144] Given this situation, the whole question of racial equality—the seed of the due process revolution—was placed in the hands of the United States Supreme Court. The Supreme Court would ultimately be the federal entity taking up the task of forcing the American people to realign the reality of American society with the rhetoric regarding American equality and opportunity.[145] The subsequent actions taken by the United States Supreme Court grew out of an important historical evolution of American jurisprudence running roughly parallel to all of the above-discussed historical developments.

III. Jurisprudential Developments and the Due Process Revolution

Great changes began to emerge in the early years of the twentieth century in American jurisprudence.[146] According to legal historian G. Edward White, American jurisprudence throughout the nineteenth century was premised on the validity of universal principles whose truth could not be empirically demonstrated, but whose truth most Americans did not question.[147] Such principles included laissez-faire capitalism, which the Court frequently

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forded by a state institution); Sweatt v. Painter, 339 U.S. 629 (1950) (held that the Black law school established by the State of Texas did not in fact provide Blacks with true equality in legal education, therefore, the plan violated equal protection); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (held that requiring a Black graduate student to sit in a special class section for blacks only, to use a special desk in the library, and eat at a special table in cafeteria was unconstitutional segregation).

143. Polenberg, *supra* note 76, at 111.

144. *See id.* at 107-15; Mowrey & Brownell, *supra* note 28, at 206-09; Hodgson, *supra* note 28, at 54-60.

145. For a discussion of the disjunction between American myths and actual realities throughout American history, see generally James Oliver Robertson, American Myth, American Reality (1980) (Especially relevant to this study are those sections dealing with myth and reality regarding the issue of race. *Id.* at 92-112).

146. *See generally* G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges (1976). Professor White has traced the development of American jurisprudence throughout American history by discussing the lives and judicial philosophy of leading American jurists in the historical context of each of their respective eras. *See also*, G. Edward White, Patterns of American Legal Thought (1978).

147. White, The American Judicial Tradition, *supra* note 146, at 251.

invoked to protect corporate interests at the expense of individual rights,[148] and notions of "separate but equal" in late-nineteenth century race relations.[149] This philosophical setting produced what Professor White has called "judicial oracularism."[150] Under that system, judges applied what they perceived as broadly accepted "truths" and values to the questions brought before them and did not look any further into the realities of the world around them. In effect, under this dominant nineteenth century method of dispute resolution, the legal process became a very simple syllogism in which everyone allegedly knew the universal rule and all that judges had to do was to apply it.[151]

Beginning before and continuing throughout the First World War, a value crisis of major proportions occurred within the United States in general and in American jurisprudence in particular. The breakdown of simple truths and widely accepted values in an increasingly complex industrial society marked the end of the oracular method as the dominant approach to dispute resolution. In its place came what has been labeled "sociological jurisprudence." This approach to resolving legal disputes insisted that decisions be grounded in empirical observations of changing social conditions, stressed the need to replace pure logic with experience, and emphasized the dual responsibility of judges to preserve continuity and respond to changes in society.[152]

Following sociological jurisprudence and drawing upon its methods was "judicial realism." With judicial realism, the faith in a person's ability to find an absolute truth eroded still further. Judicial realists believed that dispute resolution by judges was an inherently illogical and idiosyncratic exercise; they advocated reducing this irrationality as much as possible by developing, through empirical observation, methods of predicting court decisions.[153]

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148. *See, e.g.*, Stone v. Farmers' Loan & Trust Co., 116 U.S. 307 (1886) (held that excessive regulation without regard to corporate profits amounts to a taking of private property for public use without just compensation or without due process of law); Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890) (held that if a company is deprived of the power of charging reasonable rates and this deprivation takes place in the absence of an investigation by judicial machinery, this amounts to an unconstitutional denial of due process of law.).

149. Plessy v. Ferguson, 163 U.S. 537 (1896) (upheld a Louisiana statute requiring separate railroad accommodations for Blacks and whites, with the Supreme Court thereby putting its imprimatur upon the "separate but equal" doctrine).

150. *See, e.g.*, White, The American Judicial Tradition, *supra* note 146.

151. *Id.* at 251-52. *See generally* Kelly & Harbison, *supra* note 42; Murphy, *supra* note 29.

152. White, The American Judicial Tradition, *supra* note 146, at 252.

153. *Id.* This new cognizance by many judges of the societal conditions around

These jurisprudential developments preceded and accompanied the great judicial crisis of 1937 in which FDR lashed out at a conservative majority on the Court which had eschewed legal realism in favor of nineteenth century values and approaches to judging.[154] A majority of the Supreme Court struck down much of the early New Deal legislation. After that crisis and several personnel changes on the nation's top tribunal, the Court sanctioned a tremendous expansion of federal and state legislative attempts to regulate economic matters. Judicial realists argue that this was necessary to deal with the difficult situations in the turbulent American society of the period.[155] After removing itself from the area of economic legislation and reform, the Court embarked on the formulation of an elaborate new constitutional law of civil rights and liberties. This new realm of activity would eventually involve the Court extensively in racial desegregation,[156] first amendment speech and religion protections,[157] regulation of communist activity,[158] and legislative reapportionment.[159]

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them and the use of such observations in rendering their decisions was illustrated by Justice Cardozo of the United States Supreme Court, and by Judges Frank and Hand on the lower federal courts. *See id.* at 256-68. For more detailed discussions of legal realism, see Wilfred E. Rumble, Jr., American Legal Realism: Skepticism, Reform, and the Judicial Process (1968); Laura Kalman, Legal Realism at Yale, 1927-1960 (1986).

154. For a discussion of FDR's "court-packing plan," see Murphy, *supra* note 29, at 128-69.

155. *Id.*

156. *See supra* notes 54, 108, 109, 140. *See also* Muir v. Louisiana Park Theatrical Ass'n, 347 U.S. 971 (1955) (vacated a lower court decision which upheld the exclusion of Blacks from a private theater located in a public park and leased from the city); Baltimore v. Dawson, 350 U.S. 877 (1955) (affirmed a lower court decision requiring the abolition of racial segregation in a municipal bathing/beach facility); Gayle v. Browder, 352 U.S. 903 (1956) (affirmed a decision declaring bus segregation unconstitutional); Derrington v. Plummer, 353 U.S. 924 (1957) (refused to grant certiorari to review a lower court decision abolishing segregation in a private restaurant operating in a county courthouse).

157. *See, e.g.*, Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937) (upheld statute legalizing peaceful picketing); Lovell v. Griffin, 303 U.S. 444 (1938) (in a case involving Jehovah's Witnesses, the Court invalidated a city ordinance prohibiting the distribution of pamphlets without permission from the city manager); Hague v. C.I.O., 307 U.S. 496 (1939) (held unconstitutional a city ordinance requiring permits from the director of public safety for the conduct of public meetings); Bridges v. California, 314 U.S. 252 (1941) (reversed a conviction for contempt of court imposed upon several newspaper editors and labor leaders because of their published comments upon litigation pending before the California courts).

158. *See, e.g.*, DeJonge v. Oregon, 299 U.S. 353 (1937) (invalidated the conviction of a Communist under the Oregon criminal syndicalist law); Herndon v. Lowry, 301 U.S. 242 (1937) (the Court invoked the "clear and present danger" doctrine to invalidate the Georgia conviction of a Communist Party organizer charged with violating a state statute against inviting insurrection).

159. *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946) (a plurality held that the general topic of legislative apportionment was peculiarly political in nature and

The entry of the United States into World War II did not disrupt the Court's preoccupation with its task of redefining, strengthening, and enlarging the scope of individual liberty and private rights under the American constitutional system. This preoccupation with individual rights, which became especially pronounced after the 1937 crisis and Roosevelt's Court appointments,[160] had been in the making for several decades. As written, the Bill of Rights appeared to regulate only the conduct of federal officials. Long before the due process revolution and the Warren Court, however, the Supreme Court had held that some of the guarantees were so fundamental—such as the first amendment protections of press, speech, and religion[161]—that state officials were required to respect them also.[162] The decisions of the Warren Court increasingly held that state officials were also obligated to comply with most of the provisions of the Bill of Rights.[163]

This increased preoccupation with individual rights was probably a partial response to the growing size and pervasiveness of government and government regulations as well as the increasing concentrations of people within the cities of an urbanizing country. Though the Supreme Court had demonstrated concern for civil liberties and private rights during the early thirties through the opinions of Justices Brandeis, Cardozo, and Stone, the liberal position on civil liberties became dominant on the Court with FDR's ap-

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therefore not a proper topic for judicial determination); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (declared invalid an Alabama law which redrew boundaries of a city so as to exclude all but a small fraction of the city's Black residents); Baker v. Carr, 369 U.S. 186 (1962) (held legislative apportionment by states was properly a matter for judicial scrutiny and possibly open to challenge under the equal protection clause of the fourteenth amendment).

160. *See supra* note 154.

161. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (held an Alabama statute prohibiting peaceful picketing invalid on its face); American Federation of Labor v. Swing, 312 U.S. 321 (1941) (held that a state may not lawfully enjoin picketing when the picketers were not parties to an immediate labor dispute); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (held a state ordinance licensing door-to-door sale and dissemination of religious tracts unconstitutional); Thomas v. Collins, 323 U.S. 516 (1945) (overturned a conviction based on a state statute requiring labor organizers to register with state officials and procure organizer's card before being allowed to solicit new members); Martin v. Struthers, 319 U.S. 141 (1943) (held unconstitutional a local ordinance prohibiting doorbell ringing, knocking on doors, and the like, for the purpose of distributing religious literature); Follett v. McCormick, 321 U.S. 573 (1944) (held invalid a city ordinance licensing all vending of religious books); Marsh v. Alabama, 326 U.S. 501 (1946) (upheld the right of a Jehovah's Witness to distribute religious literature in company-owned town); Tucker v. Texas, 326 U.S. 517 (1946) (upheld the right of persons to conduct religious solicitation on the grounds of a government-owned housing project).

162. *See generally* Cortner, *supra* note 40.

163. *See* Kelly & Harbison, *supra* note 42, at 707, 796-97, 815-16; Shannon, *supra* note 41, at 26. *See generally* Murphy, *supra* note 29.

pointment of Justices Black and Douglas. Kelly and Harbison summarize these important jurisprudential developments:

> Broadly speaking, the New Deal Justices appointed by FDR after 1937 wished to interpolate a philosophy of economic democracy, political liberalism, and individual liberty into constitutional law. To this end they sought to deliberately modernize the bill of rights, formulating new constitutional guarantees to protect labor unions in strikes and picketing and championing rights of racial and religious minorities.[164]

The Court moved with stops, starts, and retreats in the area of civil rights and civil liberties throughout the 1930s, 1940s, and early 1950s. Before *Brown*, there were celebrated individual liberties cases involving flag salute controversies,[165] and racial discrimination in colleges,[166] in primary elections,[167] and in housing,[168] as well as clashes between individual liberties and national security during World War II.[169] These responses were largely the result of the new realist approach of looking directly into societal crises rather than solely at judicial precedent, as well as of the 1937 crisis which left the Court searching for a new constitutional niche.

Just as sociological jurisprudence and legal realism emerged from the cauldron of an evolving and industrializing American society, the changes occurring in the United States of the 1940s, 1950s, and 1960s also required a new judicial approach. G. Edward White points to California Chief Justice Roger Traynor as one of the first exemplars of a new post-war jurisprudence.[170] Traynor, in a career which spanned three decades from 1940 to 1970, looked at the society around him and realized there were some social problems which did not admit of rational judicial solutions. These problems, according to Traynor, required political and legislative

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164. Kelly & Harbison, *supra* note 42, at 797.

165. *See, e.g.*, Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940) (upheld a Pennsylvania district school board in expelling two children from the public schools for refusal to salute the flag as part of a daily school exercise); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (overruled *Gobitis* and declared unconstitutional a West Virginia flag salute statute); Taylor v. Mississippi, 319 U.S. 583 (1943) (held unconstitutional three convictions under a Mississippi sedition statute which made it a felony to encourage disloyalty to the United States or to encourage refusal to salute the flag).

166. *See supra* note 142.

167. *See supra* note 141.

168. *See supra* note 108.

169. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81 (1943) (upheld military curfew applicable only to Japanese-Americans); Korematsu v. United States, 323 U.S. 214 (1944) (upheld the exclusion program placing Japanese-Americans in concentration camps as being within the combined federal war powers of Congress and the President).

170. White, The American Judicial Tradition, *supra* note 146, at 292-96.

action.[171] If legislative branches remained inactive, certain social issues might remain unresolved if the courts did not act.[172] Furthermore, judicial inaction was contrary to the historic function of courts to protect individual rights and liberties from governmental and majority demands. Justice Traynor responded to this dilemma of the post-war era by advancing a new jurisprudence which recognized that rationality was the essence of judging. He believed judges should also not suppress their intuitive senses of fairness and justice where individual rights were concerned, but rather should articulate reasoned justifications for them. White concludes that Traynor became an important architect of a judicial role compatible with the activities of a modern liberal state in which making choices between conflicting social values was an aspect of the judge as lawmaker.[173]

The Warren Court reflected the developments of sociological jurisprudence, judicial realism, and the methods employed by Justice Traynor. In reflecting these jurisprudential developments, the *Brown* opinion is replete with sociological studies of racism, including the famous study done by Gunnar Myrdal.[174] Like Justice Traynor, many members of the Warren Court took upon themselves a more activist role at a time when other branches of government either refused to constructively deal with the social crises of the period or were thwarted in their efforts. The Warren Court was a product and illustration of its historical period, and several of its members shared the values of modern liberalism which had been formulated as a result of the Depression, the New Deal, the FDR presidency, and all of the accompanying developments. This was evidenced through judicial initiatives and through their support of numerous varieties of social welfare legislation.[175] The

171. *Id.*

172. *Id.*

173. *Id.*

174. Myrdal, *supra* note 104. This work was published in 1944 and reflected the changing racial theories of anthropologists and sociologists in the 1930s and 1940s as discussed above. *See supra* notes 103-104 and accompanying text. Also cited in footnote 11 of the *Brown* decision are K.B. Clark, Effect of Prejudice and Discrimination on Personality Development (1950); Witmer & Kotinsky, Personality in the Making (1952); Deutscher & Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychology 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities*? 3 Int. J. Opinion & Attitude Res. 229 (1949); Brameld, *Educational Costs*, in Discrimination and National Welfare (MacIver ed. 1949); and Frazier, The Negro in the United States (1940). Brown v. Board of Education, 347 U.S. 483, 494-95, n.11 (1954).

175. *See* Murphy, *supra* note 29, at 272-78, 458-85; White, The American Judicial Tradition, *supra* note 146, at 318-25. For additional studies of the Warren Court, see Louis M. Kohlmeier, God Save this Honorable Court (1972); Alexander Bickel, *supra* note 26; Archibald Cox, *supra* note 26. For studies of developments preced-

Warren Court initiatives which best illustrate this new jurisprudence and the emergence of the due process revolution involve cases dealing with equal voting rights,[176] the rights of those accused of criminal offenses,[177] and school desegregation.[178]

Certainly at the core of *Brown*—and indeed of the whole due process revolution—was the race issue. It was an issue which had, according to Louis Kohlmeier, "plagued the conscience of America longer, led to more violence, [and has been] a bigger wart on her

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ing the Warren Court, see C. Herman Pritchett, The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947 (1963); C. Herman Pritchett, Civil Liberties and the Vinson Court (1954).

176. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (outlawed the all-white Jaybird organization primaries which had controlled the party's nominations); Baker v. Carr, 369 U.S. 186 (1962) (held that the equitable apportionment of voters among districts from which members of the state legislature are chosen is justiciable and not a political question); Wesberry v. Sanders, 376 U.S. 1 (1964) (invalidated the unequal apportionment of congressional districts in Georgia on the ground that since every voter is equal to every other voter, the districts from which representatives are chosen must be as nearly equal as practicable in population); Reynolds v. Sims, 377 U.S. 533 (1964) (extended the principle of "one man, one vote" so as to invalidate the unequal apportionment of seats in both houses of the Alabama legislature).

177. *See, e.g.*, Mallory v. United States 354 U.S. 449 (1957) (confession held invalid as evidence in federal court because it had been obtained from a defendant while he was being detained by arresting officers for an unduly long time); Mapp v. Ohio, 367 U.S. 643 (1961) (held that evidence secured without an authenticated search warrant must be excluded in a state prosecution); Gideon v. Wainwright, 372 U.S. 335 (1963) (held that included among the fundamental rights guaranteed by the fourteenth amendment is the sixth amendment right to be represented by counsel when being tried for any crime in a state court); Escobedo v. Illinois, 378 U.S. 478 (1964) (the refusal of police to honor an accused's request to consult an attorney, the obtaining of a confession from the accused after failing to advise him of his rights, and the admission of such a confession into evidence by a state court held to be a denial of due process); Miranda v. Arizona, 384 U.S. 486 (1966) (prior to any questioning a suspect in the hands of police authorities must be informed of the right to remain silent, that anything said can be used against the person in court, that the person has a right to the presence of an attorney, and that an attorney will be provided if the person cannot afford one, and failure to give such a warning renders any subsequent confession inadmissible as evidence); Katz v. United States, 389 U.S. 347 (1967) (brought electronic surveillance within the purview of the fourth amendment's prohibition of unreasonable searches and seizures); Duncan v. Louisiana, 391 U.S. 145 (1968) (first case in which the requirement of a jury trial was incorporated into the fourteenth amendment's guarantee of due process).

178. Bolling v. Sharpe, 347 U.S. 497 (1954) (ordered the desegregation of the public schools of the District of Columbia); Brown v. Board of Education, 347 U.S. 483 (1954) (the Court held the segregation of Black students in the public schools to be unconstitutional); Brown v. Board of Education, 349 U.S. 294 (1955) (the Court ordered lower courts and local authorities to implement the decision with "all deliberate speed"); Cooper v. Aaron, 358 U.S. 1 (1958) (refused to grant the Little Rock School Board a stay against integration); Faubus v. Aaron, 361 U.S. 197 (1959) (affirmed lower court's holding that Arkansas' school closure statutes were unconstitutional under the due process and equal protection clauses of the fourteenth amendment); Bush v. Orleans Parish School Bd., 364 U.S. 500 (1960) (approved a lower court's denunciation of the interposition doctrine).

Constitution" than any other issue.[179] The historical and jurisprudential developments outlined above led to this opportunity for the Supreme Court to strike out against the scourge of unequal treatment. It is in large part because of the Warren Court's moral leadership that the due process revolution began and ultimately caused Presidents Eisenhower, Kennedy, and Johnson to possess the political courage to support the Warren Court's leadership in the Civil Rights movement.[180]

The role of the Court and its influence, however, went beyond the various branches of the government. The American people came to support the view espoused by Felix Frankfurter that the Supreme Court had acquired a moral function which included the duty of ascertaining the conscience of American society.[181] In speaking of the acceptance of this role the Supreme Court had cast for itself,[182] Fred Graham captured the essence of the due process revolution in the following observation:

> For the most part, Americans have embraced this idea . . . . [I]t has seemed a good thing to have a third branch that is geared to reflect the nation's idealism. So the public in general applauded when the Supreme Court outlawed legal segregation in 1954 and unfairly apportioned legislatures in 1964, although neither move was politically feasible through the legislative process at the time.[183]

IV. Conclusion: the Reaction to *Brown* and the Years Leading up to *Gault*

As a result of the long historical and jurisprudential developments detailed above, the time was ripe in 1954 for a unanimous Supreme Court to hand down the *Brown v. Board of Education* decision. This completes the first part of the analysis of why *Gault* occurred when it did. In *Brown*, the Court focused on the unequal treatment of one sector in society based solely on their status and age-old theories and practices. The Court held as follows:

> We conclude that in the field of public education the doctrine

179. Kohlmeier, *supra* note 175, at 30.

180. *See generally* Robert E. Gilbert, *John F. Kennedy and Civil Rights for Black Americans*, 12 Presidential Studies Q. 386 (Summer 1982); James D. Calder, *Presidents and Crime Control: Kennedy, Johnson, and Nixon and the Influences of Ideology*, 12 Presidential Studies Q. 574 (Fall 1982).

181. *See* Graham, *supra* note 25, at 2.

182. *See* Robert G. McClosky, The American Supreme Court 15 (1960). Alexis de Toqueville said: "The power of the Supreme Court is immense, but it is power springing from opinion . . . . They are all powerful so long as the people consent to obey the law; they can do nothing when they scorn it." As cited in Graham, *supra* note 25, at 2.

183. Graham, *supra* note 25, at 2.

> of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.[184]

Though it is beyond the scope of this article to describe all of the subsequent attempts to equalize the treatment of other sectors in American society which resulted from *Brown*, a brief catalogue of subsequent events helps explain why *Gault* occurred when it did and illustrates the connection between the *Brown* decision and the constitutional domestication of the juvenile court in *In re Gault*.

While *Brown* focused narrowly on racial discrimination in public education, the case did serve to highlight the general issue of racial inequality. The clear mandate in *Brown* for racial equality in public schools also provided support for the tactics used in the subsequent civil rights movement in which activists battled racial discrimination in its many forms. The overtly hostile reaction of many persons in the South, and indeed across the nation, to the *Brown* decision encouraged numerous Blacks and other sympathetic persons to adopt tactics of direct action in dealing with various aspects of racial inequality.[185] Direct action methods ranged from voter registrations to civil disobedience and highly visible protests, marches, and speeches—all of which could be brought into the homes of many Americans via the increasingly pervasive national news media. Thus, *Brown* not only touched off a change in the laws, but also a change in tactics and attitudes.[186] This trend toward the increased use of direct action really began during the economic recessions of 1953 and 1954 when the large number of Blacks concentrated in urban centers experienced an increase in unemployment. These developments were coupled with a revolution in Black expectations flowing from *Brown* and the other changes in post-war America.[187] Specific incidents of the use of direct action in dealing with the race question after *Brown* include Rosa May Parks' refusal to give up her bus seat in 1955, Martin Luther King's organization of boycotts and his creation of the Southern Christian Leadership Conference, the freedom rides of CORE, activities of students from the North in the voter registration drives in the South, and marches on Washington. This active

184. Brown v. Board of Education, 347 U.S. 483, 495 (1954).

185. *See* William L. O'Neill, Coming Apart: An Informal History of America in the 1960s, at 159 (1971).

186. *See id.* at 158-75.

187. *See* Hodgson, *supra* note 28, at 61-62.

push for an end to racial inequality after *Brown* had its source in the above-discussed historical and jurisprudential developments which culminated in the *Brown* decision.[188]

In addition to the civil rights movement, other post-*Brown* events which resulted from that seminal case also serve to illustrate the expansion of the due process revolution and the subsequent full-flowering of this revolution. For example, Alexander Bickel argues that following naturally after *Brown*, the Warren Court declared Bible reading and all other religious exercises in public schools unconstitutional,[189] ordered reapportionment of the House of Representatives and the state legislatures,[190] and limited government intrusions into areas of privacy.[191] The due process revolution ignited by *Brown* reached its most spectacular heights in the area of criminal procedure at both the state and federal levels. Through its numerous decisions, the Supreme Court enhanced the rights of the accused, tightened the rules for reasonable searches and seizures, and implemented new rules for police conduct.[192] These protections reflected a new concern with fairness in the treatment of yet another segment of American society—criminal defendants. The same concern, flowing directly from *Brown* and related post-*Brown* developments, ultimately was extended to juvenile offenders in *Gault*.

Fred Graham captures the importance of the *Brown* decision

188. *See* O'Neill, *supra* note 185, at 158-65. Certainly several aspects of the culmination of the due process revolution in the treatment of Blacks—besides the Supreme Court decisions— would include the integration of all interstate busses, trains, and terminals in 1961, the Civil Rights Act of 1964, and the Voting Rights Act of 1965. For a more detailed look at the civil rights movement, see Thomas R. Brooks, Walls come Tumbling Down: A History of the Civil Rights Movement, 1940-1970 (1974); August Meier & Elliot Ruduick, CORE: A Study in the Civil Rights Movement, 1942-1968 (1973). For a study of the women's movement, growing out of the civil rights movement, see Sara Evans, Personal Politics: The Roots of Women's Liberation in the Civil Rights Movement and the New Left (1980).

189. *E.g.*, Engel v. Vitale, 370 U.S. 421 (1962); School Dist. v. Schemp, 374 U.S. 203 (1963).

190. *E.g.*, Baker v. Carr, 369 U.S. 186 (1962).

191. *E.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

192. *See supra* note 177. *See also* Bickel, *supra* note 26, at 7-8. For additional studies of the Warren Court in general, and its work for criminal defendants in particular, see *supra* note 175. *See also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: the Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185 (1983); Stephen A. Saltzerg, *Forward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151 (1980); Russell W. Galloway, Jr., *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 Santa Clara L. Rev. 773 (1980); Jerold H. Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 Mich. L. Rev. 1319 (1976); *Symposium: The Warren Court*, 67 Mich. L. Rev. 219 (1968); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. Ill. L. F. 518 (1975).

and the subsequent broadening of the due process revolution when he discusses the strong tie between racism and the increased concern for the rights of criminal defendants:

> As if it were not unfortunate enough to have a revolution in defendants' rights coincide with a crime scare, both developments are complicated further by their subtle connection with the problem of the Negro. The Supreme Court was drawn into reforming the criminal law when it set out to give Negroes equal rights before the civil laws and was faced with the absurdity of leaving them with no effective constitutional rights before the criminal law. Having outlawed Jim Crow, the Court had to humble John Law.[193]

The Kennedy presidency also illustrates the expansion and pervasiveness of the *Brown* decision. Political realignments had occurred to such an extent that JFK could court the urban and Black vote and respond to their demands without the fear of political reprisals from the electorally important South.[194] He exposed Americans to the poverty which existed in their country and asked for change. He instituted the Peace Corps which, along with an increasingly inquisitive powerful and centralized media,[195] exposed Americans to the plight of third world peoples and to the upsurge of non-White peoples around the world who demanded dignity and self-rule.[196] He pressured government officials to enforce the anti-discrimination laws to hire Blacks,[197] used executive orders to combat housing and employment discrimination,[198] and initiated litigation[199] and actively sought legislation for civil rights.[200] Through appointments, JFK strengthened the liberal majority of the Warren Court.[201] Those Justices making up the Warren majority—Warren, Black, Brennan, Douglas, and Fortas, who was later replaced by Goldberg—adhered to the basic tenets of New Deal liberalism, which included faith in the responsible use of power by government officials.[202] JFK was also concerned with juvenile crime. In the spirit of equal opportunity engendered by *Brown*, Kennedy explained the existence of juvenile delinquency by locating its source in youth unemployment and a general lack of youth programs and activities. By the 1960s, juvenile delin-

193. Graham, *supra* note 25, at 12.
194. *See* Hodgson, *supra* note 28, at 146-49.
195. *See id.* at 61.
196. *See id.*
197. *See* Murphy, *supra* note 29, at 356.
198. *See id.* at 355-57.
199. *See id.* at 355-56.
200. *See id.* at 354-57.
201. *See* Graham, *supra* note 25, at 17.
202. *See id.* at 17-18.

quency was no longer an isolated or local matter, but a national concern.[203] Thus, with a post-*Brown* nation concerned about equal and just treatment of discrete sectors of the American population coupled with this on-going concern with juvenile delinquency, it was only a matter of time before the due process revolution would arrive at the door of the juvenile court.

Accompanying this society-wide expansion of the *Brown* mandate was the break-up of the consensus of New Deal liberalism in the mid-1960s. People began to question what the state was doing and who it was serving; the state became less legitimate and more removed from larger society; there was a sense of bureacracy run amuck and beyond control. From 1963 to 1965 in particular, the United States experienced a period of great tumult and unrest: JFK was assassinated, the Civil Rights movement splintered, and the Vietnam War continued to escalate. Many people—especially the younger generations—came to view the government as blatantly hypocritical. During the later 1960s, there was a new stress on pluralism within American liberalism accompanied by a sweeping critique of long-held beliefs, ideals, and institutions.[204]

It was during this period of the concurrent breakdown of the New Deal consensus and the expansion of the *Brown* legacy that the issue of procedural due process for juvenile offenders reached the United States Supreme Court. Especially when one considers certain aspects of the breakdown of the liberal consensus, the period was certainly one in which youth, youth culture, and youth rebellion were highly visible. Many young people reacted to the Vietnam War while others criticized what they saw as a hypocritical, impersonal, and materialistic society. These young people created a counter-culture which displayed youth behavior markedly different from any past behavioral trends of American youth.[205]

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203. *See* Gilbert, *supra* note 133, at 212-17. James Gilbert asserts that under JFK, anti-delinquency programs became more important than ever before—as illustrated by the creation of the Committee on Juvenile Delinquency and Youth Culture in 1961. He also argues that these same planners and their concerns were central to LBJ's antipoverty programs. *Id.* at 216.

204. *See* O'Neill, *supra* note 185, at 233-71.

205. William L. O'Neill defined "counter-culture" as follows:

> The term itself was hard to define, as it embraced almost everything new and anti-Establishment, however frivolous. On its deepest level the counter-culture was the radical critique of Herbert Marcuse, Norman O. Brown, and even Paul Goodman. It also meant the New Left, communes and hippie farms, magic, hedonism, eroticism, and public nudity. And it included rock music, long-hair, and mini-skirts (or, alternatively, fatigue uniforms, used clothes, and the intentionally ugly or grotesque).

O'Neill, *supra* note 185, at 258. For a discussion of youth during this period and

Much of the hostility probably came from living in a society which was struggling and seemingly failing to more broadly apply the principles so painfully arrived at in *Brown*. The rebellious response of many of the young people to this situation no doubt served to highlight the problem of juvenile delinquency and establish youth as yet another discrete sector of American society demanding fair treatment by the State.

Gerald Gault was arrested during this period when the nation was concerned about and dealing with the implications of *Brown v. Board of Education*. Yet, Gerald Gault was handled by an institution whose procedures and purposes reflected the United States at the start of the twentieth century—an era far removed and very different from a post World War II and post-*Brown* American society. It took a complex historical and jurisprudential development pushed by the issue of racial discrimination to bring about the *Brown* decision and the extension of its principles beyond Blacks to numerous other discrete groups within American society, including juvenile offenders. *In re Gault* and its progeny[206] grew out of that *Brown* legacy and had the effect—at least in theory—of extending the constitutional guarantees of due process and equal protection of the law to the young people who would appear before juvenile courts throughout the United States.

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throughout American history, see generally Kett, *supra* note 20; H. Warren Button & Eugene F. Provenzo, Jr., History of Education and Culture in America (1983).

206. *See, e.g.*, *In re* Winship, 397 U.S. 358 (1970) (held that the constitutional safeguard of "proof-beyond-a-reasonable doubt" is as much required during the adjudication stage of a delinquency proceeding as the constitutional safeguards provided by *Gault*); Breed v. Jones, 421 U.S. 519 (1975) (juveniles being tried before juvenile courts have double jeopardy protections); Fare v. Michael C., 442 U.S. 707 (1979) (applied the "totality of circumstances" approach to juveniles to determine whether a person has voluntarily waived the constitutional right to remain silent when about to be interrogated); R.W.T. v. Dalton, 712 F.2d 1225 (8th Cir. 1983) (juveniles who are detained because they are suspected of committing criminal acts must be afforded a prompt probable cause hearing).

Some post-*Brown* cases have limited the rights of juveniles. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (trial by jury in a juvenile court's adjudicatory stage is not a constitutional guarantee); Swisher v. Brady, 438 U.S. 204 (1978) (a system in which an accused juvenile is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge does not violate double jeopardy); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school officials need not obtain a warrant before searching a student who is under their authority, with the legality of the search depending on its reasonableness under all of the circumstances).

See also Kent v. United States, 383 U.S. 541 (1966) (a case coming down the year before *Gault* and holding that for there to be a valid waiver of jurisdiction by the juvenile court there must be (1) a hearing; (2) access by counsel to the records and reports; and (3) a statement of reasons).